Raymond Interior Systems *and* Southern California Painters and Allied Trades District Council No. 36, International Union of Painters and Allied Trades, AFL–CIO

United Brotherhood of Carpenters and Joiners of America, Local Union 1506 *and* Southern California Painters and Allied Trades District Council No. 36, International Union of Painters and Allied Trades, AFL–CIO and Southwest Regional Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, Party in Interest. Cases 21–CA—037649 and 21–CB–014259

May 14, 2019

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

On September 30, 2010, the National Labor Relations Board issued its Decision and Order in this proceeding.[1] The Board found that on October 2, 2006:

- Respondent Raymond Interior Systems (Raymond) violated Section 8(a)(1), (2), and (3) by conditioning continued employment of its drywall finishing employees on their immediate membership in Respondent Carpenters Local Union 1506 (the Carpenters), and by unlawfully assisting the Carpenters in obtaining authorization cards from the drywall finishing employees;
- Raymond violated Section 8(a)(1) and (2) by granting recognition under Section 9(a) to the Carpenters, and the Carpenters violated Section 8(b)(1)(A) by accepting recognition, at a time when the Carpenters did not represent an uncoerced majority of Raymond's drywall finishing employees;
- Raymond violated Section 8(a)(3) and the Carpenters violated Section 8(b)(2) by applying the Carpenters 2006 Drywall/Lathing Master Collective-Bargaining Agreement (Carpenters 2006 Master Agreement) to Raymond's drywall finishing employees when the Carpenters did not represent an uncoerced majority of those drywall finishing employees;
- and the Carpenters violated Section 8(b)(1)(A) by failing to inform the drywall finishing employees of their rights under *Communications Workers v. Beck*, 487 U.S. 735 (1988).

Among other remedies provided for these violations, the Board ordered Raymond and the Carpenters to cease and desist from maintaining and enforcing the Carpenters 2006 Master Agreement unless and until the Carpenters was certified as the drywall finishing employees' exclusive representative.

Three weeks before these unlawful acts were committed, Raymond and the Carpenters entered into a Confidential Settlement Agreement, which applied the Carpenters 2006 Master Agreement to Raymond's drywall finishing employees "to the fullest extent permitted by law" effective October 1, 2006, the day before the violations summarized above were committed.

On December 30, 2011, the Board granted in part and denied in part a Motion for Reconsideration filed by Raymond and the Carpenters. 357 NLRB 2044 (2011). The Board denied the motion as to the Respondents' argument that the Board had erroneously failed to decide whether the Confidential Settlement Agreement constituted a valid agreement under Section 8(f) of the Act, effective October 1, that was not invalidated by Raymond's subsequent acts of unlawful assistance on October 2. The Board declined to address the merits of this argument, reasoning that doing so would not affect its conclusion that Raymond unlawfully recognized the Carpenters as the 9(a) representative of its drywall finishing employees on October 2. In response to another argument raised by Raymond, the Board deleted the provision in its Order directing Raymond to provide its drywall finishing employees with alternate benefits coverage equivalent to the coverage that those employees enjoyed under the Carpenters 2006 Master Agreement. The Board instead modified its Order to allow Raymond to maintain the benefits already in place under that Agreement.

Subsequently, Raymond, the Carpenters, and the Charging Party, Southern California Painters and Allied Trades District Council No. 36, International Union of Painters and Allied Trades, AFL–CIO (the Painters), each filed a petition for review of the Board's Order, and the Board cross-applied for enforcement.

On February 5, 2016, the United States Court of Appeals for the District of Columbia Circuit enforced the Board's unfair labor practice findings. *Raymond Interior Systems v. NLRB*, 812 F.3d 168 (D.C. Cir. 2016). However, the court remanded the case to the Board for further

[1] 355 NLRB 1278 (2010), reaffirming and incorporating by reference 354 NLRB 757 (2009).

consideration of whether the above-mentioned Confidential Settlement Agreement between Raymond and the Carpenters created a lawful 8(f) agreement effective October 1 "that could not, without more, be vitiated by the unfair labor practices" committed by the Respondents on October 2. Id. at 173, 181. The court stated: "Raymond and the Carpenters claim that even if their attempt to execute a 9(a) agreement on October 2 failed, this could not have nullified the preexisting 8(f) agreement." Id. at 180. The court observed that the Board's failure "to address this issue" was "hard to fathom" because there is "a long-standing principle that, as a general matter, when a collective bargaining agreement is not a byproduct of unfair labor practices and does not otherwise hinder the policies of the Act, 'the Board [is] without authority to require [the parties] to desist from giving effect to the [agreement].'" Id. at 180–181 (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 236–238 (1938)) (alterations in original). The court stated that the Board applied this principle in *Zidell Explorations*, 175 NLRB 887 (1969), which Raymond cited in its motion for reconsideration. As quoted by the court, the Board in *Zidell Explorations* stated:

> [I]t has long been established by Board and court cases that employer acts of unlawful assistance occurring after the execution of a lawful contract, and during the contract term, do not justify a remedial order suspending recognition of the assisted union during the contract term or directing that the contract be set aside.

Raymond, 812 F.3d at 181 (quoting *Zidell Explorations*, 175 NLRB at 888 (citing *Arden Furniture Industries*, 164 NLRB 1163 (1967); *M. Eskin & Son*, 135 NLRB 666 (1962), enfd. sub nom. *Confectionary & Tobacco Drivers & Warehousemen's Local 805 v. NLRB*, 312 F.2d 108 (2d Cir. 1963); *Lykes Bros. Inc. of Georgia*, 128 NLRB 606 (1960); *NLRB v. Reliance Steel Products Co*., 322 F.2d 49 (5th Cir. 1963); and *NLRB v. Scullin Steel Co*., 161 F.2d 143 (8th Cir. 1947)). The court observed that the Board "never addressed this line of authority in its decision in this case." Id. It declined to consider the Board's argument, on review, that because the employer alone was responsible for the postcontract unlawful conduct in *Zidell Explorations*, the *Zidell* Board's rationale for refusing to vitiate the contract in that case should be limited to situations in which the unlawfully assisted union was not found to have participated in the employer's unlawful conduct. The court further stated that even if it were to consider the Board's argument, the argument was contrary to *M. Eskin & Son* and *Lykes Brothers*—cited in *Zidell Explorations*—in both of which the Board declined to invalidate a prior contract in the face of postcontract unfair labor practices committed by both employers and unions. Id. According to the court, "[t]here is nothing in the *Zidell* decision to indicate that the Board meant to disavow the holdings in *M. Eskin & Son* or *Lykes Brothers*, nor is there anything to suggest the Board meant to disregard or limit the principle endorsed in *Consolidated Edison Co.* and its progeny." Id. at 182. The court concluded:

> If, as they contend, Raymond and the Carpenters executed a lawful 8(f) agreement on October 1, then their subsequent unfair labor practices that were committed when they attempted to execute a 9(a) agreement on October 2 would appear to be irrelevant to the question of whether there was a lawful 8(f) agreement on October 1. Even if, as the Board found, Raymond unlawfully recognized the Carpenters on October 2, 2006, as the 9(a) representative of its drywall-finishing employees, why would this nullify a lawful, pre-existing 8(f) agreement? The Board inexcusably failed to address this issue. We will therefore remand the case for further consideration.

Id.

In addition, the court remanded for further consideration the Painters' argument that the Board abused its discretion in declining to require Raymond to provide alternate benefits coverage to its drywall finishing employees equivalent to the coverage under the Carpenters 2006 Master Agreement. The court declined to consider this argument because the Board's decision on remand could render the Painters' argument "moot." Id. The court stated:

> If the Board concludes on remand that Raymond and the Carpenters entered into a valid section 8(f) agreement on October 1 that endured despite the subsequent unfair labor practices, the Painters Union can raise no viable challenge to the Board's decision to allow Raymond to maintain the benefits in place since the entire agreement would remain in place. If the Board finds that Raymond and the Carpenters did not enter into a valid section 8(f) agreement on October 1, then it will be up to the Board in the first instance to determine whether any adjustment in its remedial order is required.

Id.

By letter dated June 28, 2016, the Board invited the parties to file statements of position with respect to the issues raised by the court's opinion. Raymond, the General Counsel, and the Painters Union each filed a statement of position.

The Board has reviewed the entire record in light of the court's decision, which is the law of the case. Regarding the matters the court has instructed us to address on remand, we find that Raymond and the Carpenters had a lawful collective-bargaining agreement under Section 8(f) of the Act on October 1, 2006, by virtue of their

Confidential Settlement Agreement. We further find, however, that the agreement was vitiated by the unfair labor practices committed by Raymond and the Carpenters the following day. We find that the cases cited by the court, in which otherwise lawful agreements were not vitiated by subsequent unfair labor practices, are distinguishable from this proceeding. Moreover, we conclude that, in any event, the holding in *Zidell Explorations* and related Board cases did not survive the Board's subsequent decision in *John Deklewa & Sons*, 282 NLRB 1375 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), cert. denied 488 U.S. 889 (1988). Our conclusion is guided by, and vindicates, Section 8(f)'s twin objectives of protecting employee free choice and promoting stability in the construction industry, as explained below. See *John Deklewa & Sons*, 282 NLRB at 1388. In addition, we reaffirm the Board's remedial holding declining to require Raymond to provide its drywall finishing employees with alternate benefits coverage equivalent to the coverage that those employees had under the Carpenters 2006 Master Agreement.

A. Background; Section 8(f) of the Act

The facts are fully set forth in the Board's underlying decision, are summarized in the court's decision, and are very briefly summarized here. Raymond is a construction industry employer. Its drywall finishing employees had long been represented by the Painters under the terms of a 8(f) agreement. That agreement expired on September 30, 2006,[2] and Raymond terminated the agreement and its bargaining relationship with the Painters that day.

Meanwhile, on September 12, Raymond and the Carpenters had executed a "Confidential Settlement Agreement" (CSA), which provided that upon expiration of the Raymond-Painters 8(f) agreement, Raymond would apply the Carpenters 2006 Master Agreement to Raymond's drywall finishing work and employees "to the fullest extent permitted by law."[3] On October 1, the agreement envisioned in the CSA became effective. The next day, October 2, Raymond and the Carpenters committed the series of unfair labor practices summarized above, by means of which they unlawfully attempted to convert their bargaining relationship to one covered by Section 9(a) of the Act.

Section 8(f) permits an employer and union in the construction industry to enter into a collective-bargaining agreement without the union having established that it has the support of a majority of the employees in the bargaining unit.[4] Section 8(f) thus represents an exception to Section 9(a)'s general rule, which requires a showing of majority support before the employer may recognize and bargain with the union. Section 8(f) also represents an exception to the general rule that an employer and a union lacking majority support of unit employees commit unfair labor practices by entering into a bargaining relationship or agreement covering those employees. Congress enacted Section 8(f) in 1959 to accommodate the unique employment practices prevalent in the construction industry. See *Deklewa*, 282 NLRB at 1380, 1386.[5]

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[2] All dates are in 2006 unless otherwise noted.

[3] The CSA provides in pertinent part:

> WHEREAS, disputes and grievances have arisen between the parties about proper assignment of drywall finishing and other work to the proper trade, craft, and group of employees, and the parties desire to settle said disputes through a confidential settlement agreement
>
> NOW, THEREFORE, for and in consideration of the mutual promises and agreements set forth, the parties agree as follows:
>
> 1. Raymond agrees to sign the Southern California Drywall/Lathing memorandum agreement 2006-2010.
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> 2. At the expiration of Raymond's agreement with Painters District Council No. 36 on September 30, 2006, Raymond agrees that to the fullest extent permitted by law it will apply the Southern California Drywall/Lathing Agreement to its drywall finishing work and employees . . . .
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> 3. Carpenters agree to indemnify, defend, and hold harmless Raymond . . . from any final judgment, confirmed arbitration award, or final administrative order in favor of the [Painters Union] . . . arising out of or related to Raymond's termination of its collective bargaining agreement with the Painters . . . recognition of Carpenters for, application of the Southern California Drywall/Lathing Master Agreement for, or assignment of work to carpenters for drywall finishing employees and work.
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> . . . .
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> 5. The parties have attempted to create a lawful and enforceable agreement.
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> . . . .
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> 7. This agreement is a confidential settlement agreement, and the parties agree to maintain the fact and contents of this Agreement in confidence and not to disclose this Agreement to anyone, except for purposes of enforcement or as required by law.

The Respondents kept the CSA confidential and did not reveal its existence until the unfair labor practice hearing in this proceeding in April 2008.

[4] An 8(f) agreement is often a prehire agreement, entered into even before any unit employees have been hired.

[5] Sec. 8(f) provides:

> It shall not be an unfair labor practice . . . for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for

In enacting Section 8(f), however, Congress was also "mindful of employee free choice principles" and "sought to assure that the rights and privileges accorded employers and unions in the body of Section 8(f) would not operate to thwart or undermine construction industry employees' representational desires." Id. at 1380–1381. Striking the proper balance between accommodating construction industry needs and promoting employee free choice is the overarching aim of the Board's Section 8(f) jurisprudence. See id. at 1388 (noting that the Supreme Court "identified Congress' objectives in enacting Section 8(f) as an attempt to lend stability to the construction industry while fully protecting employee free choice principles" (citing *NLRB v. Iron Workers Local 103 (Higdon Contracting Co.)*, 434 U.S. 335 (1978))).

To that end, Section 8(f) does not validate an agreement where the union has been "established, maintained, or assisted by any action of the employer otherwise violative of Section 8(a)(2)" of the Act. See *Bear Creek Construction Co.*, 135 NLRB 1285, 1286 (1962). To further protect employee choice, the second proviso to Section 8(f) permits employees and other parties, including rival unions, to file election petitions to replace or decertify an 8(f) union representative at any time. The 8(f) representative itself may also petition for an election to become the unit employees' 9(a) representative. However, if an election is held during the term of an 8(f) agreement, "[a] vote to reject the signatory [8(f)] union will void the 8(f) agreement and will terminate the 8(f) relationship." *Deklewa*, 282 NLRB at 1385. Thus, if an 8(f) bargaining representative loses an election, not only does it not become the unit employees' 9(a) representative, it is also ousted as their 8(f) representative. In addition, "the Board will prohibit the parties from reestablishing the 8(f) relationship covering unit employees for a 1-year period." Id. The *Deklewa* Board explained that the purpose of this 1-year prohibition

> is to preclude an employer and a union both from ignoring the electorally expressed preference of a majority of unit employees and from maintaining an 8(f) relationship during a period when the Act precludes holding another election, the availability of which is the sine qua non safeguard to permitting and enforcing an 8(f) contract.

Id.[6]

Although parties in the construction industry may create a relationship pursuant to either Section 8(f) or Section 9(a) of the Act, the Board presumes that the parties intend their relationship to be governed by Section 8(f), absent evidence to the contrary. The burden of proving the existence of a Section 9(a) relationship falls on the party asserting that such a relationship exists. See, e.g., *Western Pipeline, Inc.*, 328 NLRB 925, 927 (1999).

B. The CSA constituted a valid collective-bargaining agreement under Section 8(f) of the Act

The first question we must address on remand is whether, on October 1, the CSA constituted a valid 8(f) agreement. For the following reasons, we find that it did. "[T]he formation of a contract is established by conduct demonstrating an intent to be bound by the terms of the agreement. These principles are equally applicable to 8(f) and 9(a) agreements." *E.S.P. Concrete Pumping*, 327 NLRB 711, 713 (1999). In this case, Raymond and the Carpenters plainly intended to be bound by the terms of the CSA. The CSA, in turn, incorporated by reference the terms of the Carpenters 2006 Master Agreement. The CSA thus evidences the parties' intention to create a contractual relationship and the terms of that agreement.[7] As stated above, Raymond was an employer in the construction industry, and the Carpenters included construction industry employees as members. There is no evidence that the Carpenters had established majority (or, indeed, any) support when the agreement took effect on October 1. Moreover, under the terms of the CSA, Raymond and the Carpenters agreed to enter into a collective-bargaining agreement covering the drywall finishing employees "to the fullest extent permitted by law," and under the

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> priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to subsection (a)(3) of this Act: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(c) or 9(e).

[6] The reference in *Deklewa* to the 1-year "period when the Act precludes holding another election" refers to Sec. 9(c)(3), which relevantly provides that "[n]o election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held."

An 8(f) bargaining relationship may be terminated by either the union or the employer upon the expiration of their collective-bargaining agreement. *Deklewa*, 282 NLRB at 1386–1387. In contrast, a 9(a) relationship and the associated obligation to bargain continues after contract expiration, unless and until the union is shown to have lost majority support. See *Madison Industries*, 349 NLRB 1306, 1307 (2007) (citing *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001)). Further, in the 9(a) context, election petitions are generally barred during the term of the agreement, up to a maximum of 3 years, because the union is entitled to a conclusive presumption of majority status during that period. See id.; *Nova Plumbing, Inc. v. NLRB*, 330 F.3d 531, 534 (D.C. Cir. 2003). But 8(f) bargaining relationships are not based on majority status, and 8(f) agreements do not bar election petitions.

[7] Construction industry employers frequently establish a valid 8(f) agreement by signing a letter of assent to an industry collective-bargaining agreement, similar to the incorporation by reference here. See, e.g., *Industrial Turn Around Corp.*, 321 NLRB 181 (1996), enf. denied in part on other grounds 115 F.3d 248 (4th Cir. 1997); *Riley Electric, Inc.*, 290 NLRB 374 (1988).

circumstances the fullest extent permitted by law was an 8(f) agreement effective October 1, promptly after the Raymond-Painters 8(f) agreement covering those employees had expired and Raymond had terminated that 8(f) relationship. Accordingly, we find that on October 1, Raymond and the Carpenters entered into an agreement under Section 8(f) of the Act. See *Carthage Sheet Metal Co.*, 286 NLRB 1249, 1251 (1987).

We disagree with the administrative law judge's finding that the CSA was insufficient to constitute a valid collective-bargaining agreement. The judge cited the CSA's asserted failure to set forth substantial terms and conditions of employment for the drywall finishing employees, including its lack of an expiration date and its title as a settlement agreement rather than a collective-bargaining agreement. See 354 NLRB at 777. Neither of these reasons is persuasive. First, the CSA incorporated by reference the Carpenters 2006 Master Agreement, which supplied the necessary component terms of a collective-bargaining agreement, including an expiration date. Second, the Board has found that a collective-bargaining agreement may be created by a settlement agreement between an employer and a labor organization. See, e.g., *Carthage Sheet Metal Co*., supra at 1251 & fn. 8; *Washington Stair & Iron Works*, 285 NLRB 566, 566 (1987).

The judge also found confusing the CSA's references to the Carpenters 2006 Master Agreement and the Carpenters 2006–2010 Southern California Drywall/Lathing memorandum agreement. See 354 NLRB at 777. We see no cause for confusion; the memorandum agreement was merely a "short-form version" of the Carpenters 2006 Master Agreement. See *Raymond*, 812 F.3d at 174.

Finally, the judge opined that entering into the CSA on September 12 was itself an unlawful act because it occurred during the term of the Painters-Raymond 8(f) collective-bargaining agreement. See 354 NLRB at 777. Under the CSA, however, the Carpenters 2006 Master Agreement would not apply to Raymond's drywall finishing work and employees until the Raymond-Painters 8(f) agreement expired on September 30, at which time Raymond could and did lawfully terminate its 8(f) bargaining relationship with the Painters. Moreover, the General Counsel has never alleged that Raymond and the Carpenters committed any unfair labor practices prior to October 1. In sum, we find that Raymond and the Carpenters, by virtue of the CSA, had a lawful 8(f) agreement on October 1.

C. The Respondents' Unfair Labor Practices Warrant Vitiation of the 8(f) Agreement, and Precedent Cited by the Court of Appeals does not Compel a Contrary Conclusion

Having found that the parties had a valid 8(f) agreement on October 1, we now turn to the court's principal question: whether that agreement was vitiated by the parties' unlawful conduct on October 2. As stated above, the court observed that, as a general matter, when a collective-bargaining agreement "is not a byproduct of unfair labor practices and does not otherwise hinder the policies of the Act, 'the Board [is] without authority to require [the parties] to desist from giving effect to the [agreement].'" *Raymond*, 812 F.3d at 181 (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. at 236–238). The court further observed that the Board has applied this principle in several cases, including *Zidell Explorations*, supra, where the Board stated that "employer acts of unlawful assistance occurring after the execution of a lawful contract, and during the contract term, do not justify a remedial order suspending recognition of the assisted union during the contract term or directing that the contract be set aside." 175 NLRB at 888. In remanding the case, the court instructed us to address this principle and precedent and to explain how, in light of this precedent, Raymond's unlawful recognition of the Carpenters as the drywall finishing employees' 9(a) representative could nullify a lawful preexisting 8(f) agreement.

Our response to the court's instructions on remand consists of four parts. First, the relevant facts of this case, reviewed below, demonstrate a blatant and virtually immediate attempt by the Respondents to foreclose the free exercise by the drywall finishing employees of their right—safeguarded by Section 8(f)'s second proviso and the Board's decision in *Deklewa*—to reject or replace the Carpenters as their representative. By this conduct, the Respondents demonstrated that they could not be trusted to respect these rights. Accordingly, we believe the Board's order requiring the Respondents to cease giving effect to the Carpenters 2006 Master Agreement, which effectively nullified the October 1 8(f) agreement, was necessary to effectuate the policies of the Act. Second, as explained below, nullification of the 8(f) agreement is necessary to align this case with *Deklewa*. Third, *Zidell Explorations* and the other Board cases cited by the D.C. Circuit are materially different from this case and do not compel a contrary result. Finally, even assuming those cases broadly stand for the proposition announced in *Zidell*—i.e., that "employer acts of unlawful assistance occurring after the execution of a lawful contract, and during the contract term, do not justify a remedial order . . . directing that the contract be set aside"—we conclude that where the prior lawful contract is governed by Section 8(f), that

proposition did not survive the Board's subsequent decision in *Deklewa*.

1. Under the circumstances of this case, the policies of the Act support nullification of the prior 8(f) agreement

The facts reveal the Respondents' attempt, through unlawful means, to deny Raymond's drywall finishing employees their right to replace or reject the Carpenters as their new 8(f) representative. That attempt was not evident at first. The 8(f) agreement between Raymond and the Carpenters took effect on October 1, upon the expiration of Raymond's 8(f) agreement with the Painters on September 30. Raymond and the Carpenters realized that the change in bargaining representative of the drywall finishing employees from the Painters to the Carpenters, along with the necessity of those employees signing new forms to ensure their health insurance and pension coverage under the Carpenters' benefits plans, "would have to be explained to Raymond's drywall-finishing employees." See 354 NLRB at 765. Raymond and the Carpenters accordingly "developed plans for meeting with those employees to explain [these] subjects." Id. That meeting occurred on October 2, with top officials of both Raymond and the Carpenters present. So far, so good. However, at that meeting, the Respondents committed unfair labor practices: Raymond unlawfully assisted the Carpenters in obtaining authorization cards by threatening its drywall finishing employees that there would be no work for them if they failed to sign with the Carpenters "that day." This statement coerced the drywall finishing employees into signing authorization cards, upon which Raymond immediately and unlawfully granted 9(a) recognition to the Carpenters, which the Carpenters unlawfully accepted. In short, the lawful 8(f) agreement between Raymond and the Carpenters was followed almost immediately by unlawful activity intended to insulate that agreement, and the Carpenters' representative status, from challenge.

This unlawful conduct was an attempt to deprive the drywall finishing employees of their rights under Section 8(f). Any of the drywall finishing employees were entitled under Section 8(f)'s second proviso to file an election petition to "decertify" the Carpenters at any time during the term of the 8(f) agreement.[8] Rival unions, including the Painters, were similarly entitled to petition to replace the Carpenters during that same term. Such petitions would have been barred, however, commencing on October 2, if the parties' unlawful attempt to convert their agreement to one covered by Section 9(a) had succeeded. At that point, the Carpenters would have enjoyed the full panoply of 9(a) rights, including a conclusive presumption of majority status during the term of the agreement (up to a maximum of 3 years). See *Nova Plumbing, Inc. v. NLRB*, 330 F.3d at 534. As the Board declared in *Deklewa*, however, under Section 8(f) "employees are assured the constant availability of an electoral mechanism for expressing their representational desires" and will not be "forced to continue working under the regimen of a union they would prefer to reject or change." 282 NLRB at 1386. The availability of this electoral mechanism is critical to the balance between employee free choice and stability embodied in Section 8(f). By their unlawful attempt to create a 9(a) relationship on October 2, the Respondents sought to disable that mechanism, leaving the drywall finishing employees with a 1-day window—of which they had not even been advised—to exercise their rights under Section 8(f)'s second proviso.[9]

Moreover, this conduct was not mere happenstance. As the administrative law judge found, the unlawful conduct of Raymond and the Carpenters was animated by the desire to limit the ability of a rival union—specifically, the Painters, which had represented Raymond's drywall finishing employees since at least 1966—to file a representation petition.[10] To this end, Raymond scheduled the October 2 meeting furtively. Its general superintendent and other officials telephoned the drywall finishing employees on the evening of October 1, directing them to be at the Respondent's Orange, California facility at 6 a.m. for a meeting. That meeting was held amid tight security, the "obvious purpose" of which "was to keep nonemployees, especially Painters Union officials[,] out of the [meeting]." 354 NLRB at 766 fn. 12. Later that day, Raymond unlawfully granted, and the Carpenters unlawfully accepted, 9(a) recognition. The reasonable inference to be drawn from these facts is that the Respondents intended to foreclose a petition challenging the Carpenters' representation by establishing a 9(a) relationship on October 2.

In our view, these facts made it appropriate for the Board to order Raymond and the Carpenters to cease and desist giving effect to the Carpenters 2006 Master Agreement altogether, which effectively nullified the October 1 8(f) agreement. By their unlawful acts of October 2,

[8] Strictly speaking, since an 8(f) representative is not certified by the Board, a petition for an election to oust an 8(f) representative is not a petition to "decertify" that union. Nevertheless, employees still would file an RD or "decertification" petition.

[9] The employees learned that they were represented by the Carpenters only at the October 2 meeting where Raymond coerced them into signing Carpenters authorization cards.

[10] See 354 NLRB at 774 ("[G]iven the legal training of the principals of [Raymond and the Carpenters], they most certainly would have been aware of the possibility of a representation petition, filed by the Painters Union, and the resultant legal consequences and that only a collective-bargaining agreement with a 9(a) representative would bar such a petition.").

Raymond and the Carpenters demonstrated their utter disregard of the drywall finishing employees' rights under Section 8(f) to decertify the Carpenters or to replace that union with another representative—such as the Painters, which had represented those employees for at least 40 years. Theoretically, leaving the 8(f) agreement intact would have preserved the drywall employees' free-choice rights under Section 8(f)'s second proviso. Unfortunately, however, the Respondents had proven that they could not be trusted to respect those rights. Accordingly, we believe the policies of the Act were best effectuated by dissolving the Raymond-Carpenters bargaining relationship and voiding the prior 8(f) agreement.[11]

In reaffirming the nullification of the 8(f) agreement and termination of the bargaining relationship, we are mindful of Section 8(f)'s objective of promoting stability in construction industry bargaining relationships. But in this case, there is no meaningful stability to promote. The 8(f) agreement between the Respondents lasted 1 day. Vitiating that agreement will not destabilize a legitimate relationship between bargaining partners. Finally, in choosing to vitiate the agreement here, we are also guided by the principle that the purpose of a Board remedial order is to "restore so far as possible the status quo that would have obtained but for the wrongful act." *Rutter-Rex Mfg. Co,* 396 U.S. 258, 265 (1969). It is impossible to know with certainty what would have happened in the absence of the Respondents' unfair labor practices. In such a situation, fashioning an appropriate remedy is necessarily a difficult task. See *Graphic Communications Local 4 (San Francisco Newspaper)*, 272 NLRB 899, 900 (1984), modified sub nom. *S.F. Web Pressman & Platemakers' Union v. NLRB*, 794 F.2d 420 (9th Cir. 1986). In these circumstances, vitiation of the 8(f) agreement appears to us the best approximation of a return to the status quo ante. The Respondents' haste to extinguish the 8(f) bargaining relationship as quickly as possible convinces us that the Respondents themselves never seriously contemplated engaging in a meaningful 8(f) relationship. Consistent with the Respondents' own conduct, we find it remedially appropriate to reaffirm the underlying Order terminating that relationship.

2. Nullifying the prior 8(f) agreement is necessary to align this case with *Deklewa*

While the policies of the Act favor nullification of the October 1 8(f) agreement, *Deklewa* virtually compels that result. As explained above, the Board in *Deklewa* held, among other things, that if an 8(f) representative proceeds to an election and loses, not only is it not the unit employees' 9(a) representative, it is no longer their 8(f) representative, either; the parties' 8(f) agreement is rendered void; and the employer and union are precluded from reestablishing an 8(f) relationship for a 1-year period. 282 NLRB at 1385. In light of this holding, it would be unjust to permit the preexisting 8(f) agreement in this case to remain intact following the parties' attempt, through unlawful means, to create a 9(a) relationship. To permit that agreement to remain in place would mean that an 8(f) representative that sought, through the lawful means of a Board-conducted election, to become the unit employees' 9(a) representative and lost would be in a worse position than an 8(f) representative that unlawfully accepted unlawful assistance to become the unit employees' 9(a) representative. The law-abiding but unsuccessful union would be ousted as the unit employees' bargaining representative and barred from re-establishing its representative status under Section 8(f) for a year, and its 8(f) agreement would be voided. Meanwhile, the law-breaking union would retain its status as the unit employees' bargaining representative, and its 8(f) agreement would remain intact. To avoid this injustice and align this case with *Deklewa*, we reaffirm the underlying Order—which effectively nullified the October 1 8(f) agreement—requiring Raymond and the Carpenters to cease and desist from maintaining and enforcing the Carpenters 2006 Master Agreement unless and until the Carpenters is certified as the drywall finishing employees' exclusive representative. Alignment with *Deklewa* further requires that when an 8(f) representative unlawfully accepts unlawful employer assistance aimed at making it the unit employees' 9(a) representative, not only is the 8(f) agreement voided and the 8(f) relationship terminated, but that union is barred from reestablishing its representative status under Section 8(f) for 1 year.[12]

[11] As explained below, however, Raymond and the Carpenters were entitled to re-establish an 8(f) bargaining relationship beginning 1 year from the date of their unlawful conduct, i.e., October 2, 2007.

[12] In the Order granting in part and denying in part Raymond's motion for reconsideration, joined by the Carpenters, the Board stated that the underlying Order "should not be interpreted as requiring a Board certification of representative before Raymond may lawfully recognize the Carpenters (or any other labor organization) as its employees' 8(f) collective-bargaining representative." 357 NLRB at 2044 fn. 5. To the extent this statement suggested that Raymond could have recognized the Carpenters as the drywall finishing employees' 8(f) representative within the first year following the October 2, 2006 violations, we clarify that such recognition may not be granted to the unlawfully assisted union for a 1-year period following such violations. Of course, no bar period applies to 8(f) recognition of a different union.

3. *Zidell Explorations* and related Board cases do not compel a different result

The foregoing considerations, however compelling, would not warrant reaffirmance of the Board's order if the precedent cited by the court of appeals required the Board to leave the prior 8(f) agreement in place. The Respondents filed a motion for reconsideration of the Board's decision, in which they drew the Board's attention to this precedent and argued that it precluded the Board from nullifying the 8(f) agreement. The Board found it unnecessary to address this argument, and the court of appeals criticized the Board for failing to do so. We address this issue now.

In remanding this matter to the Board, the court cited three Board cases—*Zidell Explorations*, 175 NLRB 887 (1969), *M. Eskin & Son*, 135 NLRB 666 (1962), and *Lykes Bros. Inc. of Georgia*, 128 NLRB 606 (1960)—in which the Board did not nullify collective-bargaining agreements based on postcontract unlawful assistance of various sorts. We respectfully find that these cases are materially distinguishable from the instant case.

Zidell Explorations involved two respondent employers. The respondents separately entered into lawful Section 8(f) agreements containing union-security provisions.[13] Subsequently, the respondents violated the Act by requiring new employees to execute dues and initiation fee checkoff authorizations (and, in the case of one of the respondents, to apply for membership in the union) and by deducting union dues and fees during the first 30 days of their employment. The trial examiner determined that the contracts, though valid when made, were rendered unlawful by these postcontract unfair labor practices. The Board disagreed, stating that it did not read Section 8(f) as permitting, much less requiring, the invalidation of a lawful prehire contract simply because of subsequent acts of unlawful assistance for which the employer alone was responsible. *Zidell Explorations*, 175 NLRB at 887–888. More broadly, the Board stated that "employer acts of unlawful assistance occurring after the execution of a lawful contract, and during the contract term, do not justify a remedial order . . . directing that the contract be set aside." Id. at 888.

M. Eskin & Son and *Lykes Brothers* did not involve 8(f) bargaining relationships. The unions in those cases were the unit employees' 9(a) representatives. In *M. Eskin & Son*, 135 NLRB at 666, 680, 684, the Board found, among other things, that some employees became disillusioned with the incumbent union and expressed their disillusionment by striking. The employer and the union subsequently imposed conditions on the reinstatement of a subset of the strikers,[14] and some of those conditions constituted unlawful assistance, which the union unlawfully accepted. Id. at 682−684. The trial examiner ordered the employer to withdraw and withhold recognition from the union, and both parties to cease performing, maintaining, or otherwise giving effect to their contract; but the Board reversed this aspect of the trial examiner's decision. Citing *NLRB v. Scullin Steel Co*., 161 F.2d 143, 147 (8th Cir. 1947), the Board observed that because the unfair labor practices occurred during the term of the contract, the execution and maintenance of which were "not under attack," the trial examiner's recommended remedy was not necessary to effectuate the policies of the Act. The Board also stated that there was "no basis for a finding that the contract between the parties was a consequence of the unfair labor practices found, or that the contract thwarts any policy of the Act[.]" Id. at 671 & fn. 15.

In *Lykes Brothers*, 128 NLRB at 606–609, 611–614, the Board found, in relevant part, that while a 9(a) agreement was in place, the employer, among other things, unlawfully assisted the union and threatened certain employees with reprisal for failing or refusing to join the union. The Board also found that the union violated the Act by, among other things, coercively soliciting certain employees to authorize dues checkoff. The Board entered remedies for these violations but rejected the trial examiner's recommendation that the employer cease maintaining and enforcing its contract with the union and withdraw and withhold recognition from the union. The Board stated that

> all of the unlawful assistance occurred shortly after the execution of a presumptively lawful contract, and at a time when, because of that contract, the employees could not appropriately seek to change their representatives, and there is no evidence of any background conduct before the execution of the contract which could be said to have strengthened the [union's] representative status.

Id. at 610–611.

Zidell Explorations, *M. Eskin & Son*, and *Lykes Brothers* are materially distinguishable from the instant case. In *Zidell*, the coercive conduct related to union-security and dues checkoff. Dues-checkoff authorization is voluntary, and in *Zidell* the employers required new hires to authorize dues checkoff. They also began deducting dues from employees' paychecks before the statutorily mandated 30-

[13] The contracts contained "30-day union shop provision[s], valid in form, and a checkoff clause requiring the employers, upon written authorization from employees, to deduct union dues and fees for remittance to the Union." *Zidell Explorations*, 175 NLRB at 887.

[14] The strikers were required to execute documents reaffirming the existing contract and the union as their bargaining agent, reauthorizing dues checkoff, withdrawing a petition and charges filed by another union on their behalf, and releasing the union from any claims.

day period had elapsed.[15] Without minimizing the seriousness of these violations, we observe that the unlawful assistance given in *Zidell*—unlike the unlawful assistance given and accepted in the instant case—did not involve a frontal assault on unit employees' rights to decertify or replace their 8(f) representative. Thus, in *Zidell*, the parties did not demonstrate that they could not be trusted to respect those rights, and nullifying the 8(f) agreement and terminating the 8(f) bargaining relationship were not necessary to effectuate the policies embedded in Section 8(f)'s second proviso.

M. Eskin & Son and *Lykes Bros.* are even more easily distinguished. They involved 9(a) bargaining relationships and therefore different legal and policy considerations regarding whether a contract may be nullified based on postcontract unlawful assistance. Under Section 9(a)—unlike under Section 8(f)—an employer may not recognize and bargain with a union unless an uncoerced majority of employees in the represented unit support that union. Moreover, in the 9(a) context, a collective-bargaining agreement bars decertification and rival union election petitions for the term of the agreement, up to a maximum of 3 years. During this contract-bar period, the incumbent union enjoys a conclusive presumption of majority status. Thus, unlike the drywall finishing employees in this case, the employees in both *M. Eskin & Son* and *Lykes Brothers* had already lawfully selected a 9(a) bargaining representative, and the contracts in place would have barred the filing of an election petition to decertify or replace those unions. Indeed, the Board in *Lykes Brothers* recognized this principle, stating that "because of that contract, the employees could not appropriately seek to change their representatives . . . ." 128 NLRB at 610. Thus, the representational rights of the unit employees under Section 8(f)'s second proviso, central to the instant case, were irrelevant in *M. Eskin & Son* and *Lykes Bros.*[16]

4. Even if broadly construed, the holding of *Zidell Explorations* did not survive *Deklewa*

The unlawful assistance provided the union in *Zidell Explorations* is a far cry from the unlawful conduct in this case. Here, that assistance directly interfered with the unit employees' rights under Section 8(f)'s second proviso to replace or decertify the Carpenters; in *Zidell*, the assistance was limited to union-security and dues-checkoff matters. Nevertheless, we recognize that the Board in *Zidell* broadly stated that "employer acts of unlawful assistance occurring after the execution of a lawful contract, and during the contract term, do not justify a remedial order . . . directing that the contract be set aside." *Zidell Explorations*, 175 NLRB at 887–888. And we are, of course, mindful that it was this language from *Zidell* that the court of appeals emphasized in remanding this case. Although we believe this language is inapplicable to the materially different facts presented here, we will assume for present purposes that *Zidell* announced a holding that renders distinctions between types of unlawful assistance immaterial.

So construed, *Zidell Explorations* still does not warrant reinstating the 8(f) agreement between Raymond and the Carpenters because that holding did not survive the Board's subsequent decision in *Deklewa*, supra. Again, in *Deklewa*, the Board held, among other things, that if an 8(f) representative proceeds to an election and loses, it is ousted as the unit employees' 8(f) representative, and the parties' 8(f) agreement is rendered void. 282 NLRB at 1385. After *Deklewa*, it cannot be the case that a preexisting 8(f) agreement remains intact following an attempt, through unlawful means, to create a 9(a) relationship.

[15] The first proviso to Sec. 8(a)(3) relevantly provides that "nothing in this Act . . . shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein *on or after the thirtieth day following the beginning of such employment* or the effective date of such agreement, whichever is the later . . . " (emphasis added).

[16] The Supreme Court's decision in *Consolidated Edison*, also cited by the D.C. Circuit, is similarly distinguishable. The Court issued that decision in 1938, long before Sec. 8(f) was added to the Act in 1959. In 1938, there was no such thing as an 8(f) bargaining representative, and no need to safeguard the free-choice rights of employees represented by a labor organization they did not select. The union that represented the employees in *Consolidated Edison* had been chosen by those employees to represent them. Moreover, the Board had dismissed a charge alleging that the employers in that case had unlawfully interfered in that choice, and it was " a matter of mere conjecture to what extent membership in the [union] was induced by any illegal conduct on the part of the employers." 305 U.S. at 238. Thus, in rejecting the Board's contract-nullification remedy, the Supreme Court was protecting the employees' choice of bargaining representative and the collective-bargaining agreements entered into by that representative. We also seek to protect employees' free-choice rights; but in the circumstances presented here, we believe this protection is best effectuated by nullifying the 8(f) agreement, as explained above.

The circuit court cases cited by the D.C. Circuit are also distinguishable. In each, the subsequent unlawful acts of assistance did not call into question the majority status of the unions. See *NLRB v. Reliance Steel Products*, 322 F.2d 49, 56 (5th Cir. 1963) (election results left no question of union's majority status, and the collective-bargaining agreement was entered into "at a time when no question . . . could have been raised concerning [the union's] authority to represent the employees"); *NLRB v. Kiekhaefer Corp.*, 292 F.3d 130, 137 (7th Cir. 1961) (employer received "petitions signed by a majority of its employees that [the incumbent union] continue[s] to be their representative"); *NLRB v. Scullin Steel Co.*, 161 F.2d at 147 (union had been selected as bargaining representative by a majority of employees and certified by the Board; "[t]here does not seem to be even a suspicion that the [union] did not remain the choice of the majority of the employees"). In contrast, the Respondents' unfair labor practices subverted the unit employees' rights under Sec. 8(f) to replace or decertify the Carpenters, and their "choice" of the Carpenters as 9(a) representative was coerced.

Otherwise, the law-abiding but unsuccessful union would be ousted and its 8(f) agreement voided, while the law-breaking union would retain its representative status and its 8(f) agreement would remain intact. Because such a result would be unconscionable, we must and do conclude that *Deklewa* effectively overruled *Zidell Explorations* and related Board cases to the extent those cases held that employer acts of unlawful assistance can never justify a remedial order setting aside a prior lawful contract.

D. The Employee Benefits Remedial Issue

By virtue of the CSA, the Carpenters 2006 Master Agreement became effective October 1 as an 8(f) contract. The Board nullified that agreement in its Order in the underlying decision, and we have reaffirmed the nullification of that agreement. Doing so, we believe, is necessary to protect the representational rights of the unit employees under the second proviso to Section 8(f). However, the Carpenters 2006 Master Agreement provided the drywall finishing employees a range of benefits, and nullifying that agreement could have serious adverse consequences for the unit employees. We must take care not to harm the very employees whose rights we seek to protect.

The Board's Order originally directed Raymond to provide its drywall finishing employees with alternate benefits coverage equivalent to the coverage that those employees possessed under the Carpenters 2006 Master Agreement. See 354 NLRB at 758. Upon reconsideration, the Board deleted the alternate benefits provision and instead "provided that nothing in this Order shall require any changes in wages or other terms and conditions of employment that may have been established pursuant to [the Carpenters 2006 Master Agreement]." *Raymond Interior Systems*, 357 NLRB at 2045. Raymond was thus allowed to maintain the benefits in place for the drywall finishing employees under the Carpenters 2006 Master Agreement.

The Painters sought review of the Board's decision declining to order alternate benefits. The court remanded the issue, concluding that if the Respondents did not have a lawful 8(f) agreement by virtue of the CSA, the Board must determine whether any modification in our remedial employee benefits determination is warranted.

Having found that the Respondents October 1 8(f) agreement is properly vitiated, we affirm our decision that Raymond may continue to provide the benefits already in place under the Carpenters 2006 Master Agreement and is not required to provide equivalent alternate benefits. This result best insulates the employees from harm by ensuring the stable receipt of benefits while disestablishment of the Raymond-Carpenters bargaining relationship is effected.

It is the primary responsibility of the Board to devise remedies that effectuate the policies of the Act, and the Board is vested with broad discretion in that determination. *Sure-Tan*, *Inc. v. NLRB*, 467 U.S. 883, 898–899 (1984); *Fibreboard Paper Products*, 379 U.S. 203, 215–216 (1964). "Where as a result of unfair labor practices a union cannot be said to represent an uncoerced majority, the Board has the power to take appropriate steps to the end that the effect of those practices will be dissipated. That necessarily involves an exercise of discretion on the part of the Board." *Machinists Lodge 35 v. NLRB*, 311 U.S. 72, 81 (1940). When devising the appropriate remedy in this context, a key goal of the Board is to ensure that employees are not penalized by the disestablishment of the unlawful bargaining relationship and resulting collective-bargaining agreement. See *Mego Corp.*, 254 NLRB 300, 301 (1981). The Board seeks to ensure that the abrogation of the agreement be without prejudice to employees' wages or other conditions of employment in existence under that agreement, recognizing that employees are entirely blameless for the unlawful arrangement. Id.; *Hartz Mountain Corp.*, 228 NLRB 492, 562 (1977), enfd. sub nom. *District 65, Distributive Workers of America v. NLRB,* 593 F.2d 1155 (D.C. Cir. 1978); accord *International Ladies' Garment Workers' Union v. NLRB*, 366 U.S. at 735 fn. 7 ("[T]he terms and conditions of employment fixed by the [unlawful] agreement were not required to be varied or abandoned.").

Collective bargaining provides security to employees who know that they will receive a specified amount in wages and benefits over the course of an agreement. After October 2006, the drywall finishing employees had every expectation that they would be covered under the benefits contained in the Carpenters 2006 Master Agreement, despite the Respondents having unlawfully entered into a 9(a) agreement. Benefit plans involve myriad terms concerning a wide range of services,[17] and employees and their families rely on these terms to plan for and navigate times of illness, retirement, and death. Replicating the value of the existing benefits through alternate coverage is problematic because of unique provisions in individual benefit plans, such as the availability of specific health care providers. Thus, ordering the immediate cessation of existing plans and replacement with alternate plans would risk significant disruption to employees who have relied on familiar existing benefits procedures that cannot be

[17] The Board's remedial provision at issue here encompasses pension coverage and medical, hospitalization, prescription drug, dental, optical, life, and other insurance benefits. See 354 NLRB at 758.

precisely duplicated. Avoiding this potential disruption is a compelling remedial consideration.

As we observed above, it may be impossible to know with certainty what would have happened in the absence of the Respondents' unfair labor practices. In such a situation, fashioning an appropriate remedy is necessarily a difficult task. See *Graphic Communications Local 4 (San Francisco Newspaper)*, 272 NLRB at 900. We find that not requiring change in benefits would be least disruptive to the drywall finishing employees, and less likely to cause them to suffer the consequences of the Respondents' unlawful conduct, than an abrupt transition to alternate benefits.

The Painters argue that this remedy fails to definitively effect disestablishment, tying the drywall finishing employees to the Carpenters to the latter's advantage in securing the support of those employees. This contention, however, disregards the right of Raymond and the Carpenters to enter into a lawful 8(f) agreement any time after October 2, 2007, if they so choose, that would provide the employees with benefits under the Carpenters' benefit plans. At that point, if the Painters or another union sought to petition for 9(a) representation of the drywall finishing employees, the employees would be covered under the Carpenters' benefit plans. But we have never determined that being covered by an incumbent union's benefit plans under an 8(f) agreement creates an unfair advantage for the incumbent that deprives employees of the ability to make a free choice regarding their bargaining representative in a Board-conducted election under Section 9(a).

We of course do not condone the Respondents' unlawful conduct. It was a joint effort to coerce the drywall finishing employees into expressing support for the Carpenters and to deprive them of their rights of free choice under Section 8(f)'s second proviso. Our focus in reaffirming the nullification of the prior Raymond-Carpenters 8(f) agreement was on protecting the unit employees' representational rights, and our focus in fashioning an appropriate remedy is on protecting the "pocketbook" interests of those employees. Requiring these employees to be immediately transitioned to alternate benefit plans would do them a disservice while failing to meaningfully effectuate disestablishment in the context of the construction industry.[18]

ORDER

The Board's Order is reaffirmed.

Dated, Washington, D.C. May 14, 2019

John F. Ring,	Chairman
Marvin E. Kaplan,	Member
William J. Emanuel,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[18] No party challenges the Board's remedy that Raymond withhold recognition from the Carpenters as a 9(a) representative of its drywall finishing employees unless and until an uncoerced majority of employees favors such representation and the Carpenters have been certified by the Board as their collective-bargaining representative. As the Board observed previously, "alternate benefits coverage is not required to effectuate [this] key proscription in unlawful assistance and recognition cases." 357 NLRB at 2044.